89-572

No. ——

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARRY B. HELMSLEY, SUPERVISORY MANAGEMENT CORP. AND BROWN, HARRIS, STEVENS, INC.,
Petitioners,

v.

ROSALYN O. BEAUFORD, JOSEPH C. PALMENTO, MARIA VALLE, JOSEPH DECESARE, JR., ELSIE DECESARE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether RICO, a statute with criminal and civil applications, is unconstitutionally vague because its "pattern" element does not possess the degree of certainty the Constitution requires?

2. Whether, even if RICO were constitutional, the *en banc* opinion of the Second Circuit, reaffirmed on remand from this Court, correctly implements this Court's view of the "pattern" requirement as set forth in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989)?

PARTIES TO THE PROCEEDING

All parties to this petition are listed in the caption.* The following were also defendants-appellees below:

Avenue of America Realty Corp.
Benenson Capital Co.
Sanford G. Bluestein
Felice Earley
Estate Associates
Joan Konner
John J. Reynolds, Inc.
Saul S. Silverman
William C. Warren
William C. Breed III
Ralph W. Felsten
Lillian M. Gelfman
Robert W. Gelfman
Donald L. Jonas
Jeffrey D. Klein
Norman R. Klein
Alvin S. Lane
Fred Linden
Gertrude G. Malkin
Peter L. Malkin
Claire W. Morse
Lester S. Morse, Jr.
Richard P. Morse
Ivan Shapiro
Alvin Silverman
Harold L. Strudler
Marcel P. Aillery
J. G. White Engineering Corp.

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* Pursuant to Rule 28.1, corporate petitioners state that they have no parent, affiliate, or non-wholly owned subsidiary corporations.

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HARRY B. HELMSLEY, SUPERVISORY MANAGEMENT CORP. AND BROWN, HARRIS, STEVENS, INC.,
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v.

ROSALYN O. BEAUFORD, JOSEPH C. PALMENTO, MARIA VALLE, JOSEPH DECESARE, JR., ELSIE DECESARE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

This is a petition for writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit (*en banc*) that was vacated by this Court, 109 S.Ct. 2893 (1989), and reinstituted by the court of appeals in a one-sentence order (App. 1a).

OPINIONS BELOW

The order of the court of appeals is unreported (App. 1a). The *en banc* opinion of the court of appeals is reported at 865 F.2d 1386 (2d Cir. 1989) (App. 3a). The panel opinion of the court of appeals is reported at 843 F.2d 103. The opinion of the district court is reported at 650 F. Supp. 548 (S.D.N.Y. 1986). The *en banc* opinion in *United States* v. *Indelicato*, a companion case, is reported at 865 F.2d 1370 (App. 20a).

JURISDICTION

The order of the court of appeals reinstituting the judgment vacated by this Court was issued on September 15, 1989. This Court's jurisdiction is founded upon 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment states:

> No person . . . shall be deprived of life, liberty, or property, without due process of law. . . .

The relevant parts of 18 U.S.C. §§ 1961-1968 are:

> § 1961. Definitions
>
> As used in this chapter—
>
> (1) "racketeering activity" means . . . any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), ...
>
> * * *
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
>
> § 1962. Prohibited activities.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or

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[1] *Inter alia*, jurisdiction in the District Court was based on 28 U.S.C. § 1331.

> the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The relevant part of 18 U.S.C. § 3575(e) is:

> criminal conduct forms a pattern if it enhances criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.[2]

STATEMENT OF THE CASE

This is a RICO case that was here before on petition for writ of certiorari. By order of July 3, 1989, this Court granted the petition, vacated the judgment of the United States Court of Appeals for the Second Circuit (*en banc*) and remanded the case for "further consideration in light of *H.J. Inc.* v. *Northwestern Bell Telephone Company* . . . ." 109 S.Ct. 2893 (1989). On remand, after eliciting letter briefs from counsel, the *en banc* court of appeals announced in a one-sentence order that it would "adhere to our en banc decision in this case . . . ."

The effect of the order reinstating the *en banc* judgment of the Court of Appeals is to reject the two arguments advanced by petitioners on remand: (1) that *H.J. Inc.* and the *en banc* opinion in this case are in conflict because *H.J. Inc.* rejected the mode of RICO analysis the Second Circiut had adopted; and (2) that even if the *en banc* opinion were consistent with *H.J. Inc.*, the judgment below must fall because RICO's "pattern" requirement is unconstitutionally vague.

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[2] This provision was repealed by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, §§ 212(a)(1), (2), 235(a)(1), 98 Stat. 1987, 2031 (1984).

STATEMENT OF FACTS

This case arose out of an effort to convert to condominiums a New York apartment complex known as Parkchester which consisted of approximately 8,000 units. The plaintiffs are one person who purchased a condominium and four who did not. The petitioners, defendants below, are the partners in Parkchester Apartment Co. (a real estate partnership that sponsored the conversion), the sales agent, and others who supplied engineering reports and studies.

Seeking recovery under RICO, plaintiffs allege that the Offering Plan that launched the sales effort contained various misrepresentations and omissions. They complain also that subsequent amendments, required by law, did nothing to rectify these alleged defects.[3] As RICO predicate acts, plaintiffs allege that the Offering Plan and subsequent amendments were mailed to approximately 8,000 persons.[4] As the RICO "enterprise," plaintiffs allege both Parkchester Apartment Co. and all "the defendants as a group . . . associated in fact."

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[3] Plaintiffs' pleadings also allege a basketful of landlord-tenant disputes between Parkchester Apartment Co. and the tenants. They call each dispute a "fraud" and complain that defendants failed to disclose such "frauds" in the Offering Plan and in later amendments that were silent as to these issues. These allegations make no difference to the RICO analysis presented here because the Offering Plan mailings are still the key to the "pattern" perplexities this case involves.

[4] New York law requires that amendments be filed on a periodic basis both during the time period during which tenants have an exclusive right to purchase (90 days after the Offering Plan is accepted for filing) and periodically thereafter under certain circumstances. For example, filings are required every six months in order to keep the Offering Plan active for purposes of continuing sales. Such amendments must be filed whether or not there are material changes in the Offering Plan. Part 23, Title 13 N.Y.C.R.R., *Regulations Governing the Conversion of Occupied Residential Property to Condominium Ownership.* Amendments are also required pursuant to these regulations in regard to certain events, such as increases in prices.

The district court dismissed the complaint because it could not find a RICO "pattern" in these events. It saw them instead as involving only a volume mailing of an allegedly fraudulent document and subsequently mailed amendments which failed to correct it. The panel of the court of appeals affirmed the dismissal, concluding that a single alleged scheme to defraud tenants and other prospective buyers is insufficient to establish a pattern where the scheme though "widespread" is "discrete," and though "continuing" is "finite." 843 F.2d at 110.

But the court of appeals *en banc* vacated the panel decision and held that the "pattern" requirement was designed to exclude from the reach of RICO only acts that were "isolated" or "sporadic." The *en banc* court found it difficult to characterize as "isolated" or "sporadic" an 8,000 piece mass mailing undertaken for a common purpose. (App. 14a). And it found "continuity" adequately pleaded by the allegation that the sales effort had involved, and would involve, the mailing of subsequent amendments over time. *Id.*

The *en banc* opinion correctly observed that "since a RICO violation is an element to be proven in a civil RICO action, the substantive standards as to what must be proven in a criminal RICO prosecution also govern civil RICO actions." (App. 12a). Accordingly, the Second Circuit looked to the RICO standards it had set forth in a companion criminal case, *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) (App. 20a), for guidance. (App. 11a-14a). From that point on, its analysis conflicted with what ultimately became this Court's opinion in *H.J. Inc.*

In determining whether the facts of this case portend sufficient "continuity" to satisfy the "pattern" requirement, the court of appeals focused upon factors, derived from the language of 18 U.S.C. § 3575(e), that this Court ultimately found relevant to the determination of "relatedness," but of "no assistance," *H.J. Inc.*, 109 S.Ct.

at 2901, as to the "continuity" requirement. (App. 13a-14a; see 45a-46a). The *en banc* court then compounded that error by missing the main point of *H.J. Inc.*, which called upon courts to take a "natural and commonsense approach to RICO's pattern element." 109 S.Ct. at 2899. In this case, that approach would have called for a view of the facts more penetrating than the mere observation of mass mailings and subsequent amendments that are inevitably involved in every marketing plan.

In the aftermath of *H.J. Inc.*, this Court vacated the *en banc* judgment and remanded the case for further consideration. 109 S.Ct. 2893 (1989) (App. 1a). On remand, the court invited letter-briefs from counsel. Petitioners urged that under *H.J. Inc.*, the Second Circuit's earlier view of "continuity" in this case could no longer withstand analysis. Petitioners also presented to the court of appeals, albeit for the first time in the litigation, the contention that RICO's "pattern" requirement is unconstitutionally vague.[5]

In a one-sentence order dated September 15, 1989, the Second Circuit simply reinstated its earlier judgment without explanation.

REASONS FOR GRANTING THE WRIT

I. THE VAGUENESS QUESTION

After *H.J. Inc.*, no lawyer defending against a RICO claim can properly fail to raise the contention that RICO is unconstitutionally vague. It is not simply that four concurring Justices strongly suggested as much. 109 S.Ct. 2908-9. The majority opinion did not explicitly disagree, perhaps because the vagueness issue was not presented by the parties.

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[5] That argument was advanced in petitioners' letter brief along with a suggestion that full briefing and argument should be scheduled. By reinstating its earlier *en banc* judgment, the Second Circuit silently rejected that position. It did not certify the challenge to RICO's constitutionality pursuant to 28 U.S.C. § 2403(a), although petitioners served the Attorney General a copy of their letter brief.

Even the majority, however, could not resist the extraordinary observation that the "definitional problems that arise in interpreting RICO's pattern requirement *inevitably lead to uncertainty* regarding the statute's scope . . . ." 109 S.Ct. at 2901 n.3 (emphasis added). This view of RICO, shared by all nine Justices, does no more than echo views expressed throughout the federal court system. Typical is the equally extraordinary observation of the Second Circuit panel: "courts generally . . . remain confused (and certainly confusing) in their construction of the statute governing so-called civil RICO . . . ." 843 F.2d 103-104 (2d Cir. 1988).

Although *H.J. Inc.* attempted to eliminate the confusion about the "pattern" requirement, it did not do so. For even though the majority opinion set out to clarify the content of that requirement, the case as a whole leaves in serious doubt whether, even if so clarified, RICO is sufficiently clear to surmount the Due Process contention that it is unconstitutionally vague. Indeed, precisely because the issue was not raised by the parties in *H.J. Inc.* or decided by the majority, all that is clear now is that four, and perhaps more, of this Court's members think a serious constitutional issue is presented.

It is beyond controversy that our legal system is already awash in RICO litigation. The vagueness issue both threatens to prompt more litigation and to confuse the status of pending cases. It is altogether likely, for example, that some federal district courts will decide that question on newly filed motions to dismiss, while others will find ways to retard the development of pending matters awaiting definitive constitutional word.

These circumstances virtually call upon this Court to grant the writ of certiorari and settle the question as soon as possible.

Although petitioners did not present the vagueness question in the District Court, that fact does not pose

a jurisdictional barrier to review here. *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980). The question has now been tendered for decision to the *en banc* Second Circuit and is one of pure law, requiring no factual record beyond the allegations of the RICO complaint.

Moreover, the particular factual allegations of this case make it an excellent vehicle in which to explore the mystifying vagueness of RICO. No serious claim can be advanced that these facts lie at the hard-core of RICO and would thus be covered by a more narrowly drawn statute. Quite to the contrary, as will appear below, these facts showcase what is so hopelessly vague about the RICO "pattern" requirement even after *H.J. Inc.*

We turn first, however, to a summary of the law of "pattern" analysis as defined in *H.J. Inc.*

That case rejected the position taken by the Eighth Circuit that "predicate acts of racketeering may form a pattern only when they are part of separate illegal schemes." 109 S.Ct. at 2899. On the other hand, *H.J. Inc.* did *not* say that the absence of "separate illegal schemes" is irrelevant in determining whether a pattern exists. Instead, it established an approach that rejected altogether the search for lodestar solutions and directed the federal courts to adopt "a more natural and commonsense approach" to the pattern requirement that searches for what Congress was trying to identify—predicate acts that "were related and that amounted to, or threatened the likelihood of, continued criminal activity." 109 S.Ct. at 2899.

To establish "relatedness," a plaintiff need only show that the predicate acts "have the same or similar purposes, results, participants, victims, or methods of commission," or other characteristics showing that they are "not isolated events." 109 S.Ct. at 2901. These factors are derived from the definition of "pattern" in a related statute, 18 U.S.C. § 3575. But under *H.J. Inc.*, although

the § 3575 factors are useful to establish "relatedness," they are "of no assistance" in determining whether the second pattern element is present—whether related acts also "amount to, or otherwise constitute a threat of *continuing* racketeering activity." 109 S.Ct. at 2901 (emphasis in original).

In a gesture of understatement, *H.J. Inc.* conceded that it was "difficult to formulate in the abstract any general test for continuity" and acknowledged accordingly that whether related predicates also establish a threat of continued racketeering activity 'depends on the specific facts of each case." *Id.* at 2902.

Consistent with that "commonsense" approach, the Court offered, in place of an abstract definition, a few "examples of how [the continuity] element might be satisfied." *Id.* The seller of "protection insurance" who vows to reappear monthly to collect the "premium" presents an obvious example of continuity because his racketeering act contains an explicit "threat of repetition extending indefinitely into the future . . . ." *Id.* By contrast, the Court added, conduct involving predicate acts "over a few weeks or months and threatening no future criminal conduct" falls short of a pattern. *Id.*

This example is critical for this case because it acknowledges that, even when related predicate acts are spread out over time, they do not *necessarily* imply a threat of "continuity." Whether they do threaten continuity will depend on context—"the specific facts of each case." *Id.* For instance, as *H.J. Inc.* observed, if such acts "can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes" or are "part of an ongoing entity's regular way of doing business," *id.*, they may threaten continuity, whereas the same acts, performed by an entity of a different kind, might not.

This, then, is the message *H.J. Inc.* intends to convey: "Congress was concerned in RICO with long-term crim-

inal conduct." *Id.* at 2902. A civil complaint, alleging predicate acts that in other contexts might be crimes, does not state a RICO offense if those acts, although related to one another and not merely "isolated" or "sporadic," do not also manifest "continuity" under RICO. That there were multiple schemes, or only one scheme, may be relevant in divining continuity. But that is not dispositive any more than is the number of predicate acts, their timing, or any other single factor short of a nexus with an entity organized to practice crime.

Turning now to the facts of this case, any attempt to apply to them the "pattern" approach adopted in *H.J. Inc.* spotlights the inevitable vagueness of RICO. Taking a superficial view of these facts, an argument that they present a RICO "pattern" can be constructed. There were 8,000-plus copies of an Offering Plan mailed to prospective purchasers, followed by subsequent mailings of updating amendments that did not correct the alleged defects of the initial mailing. But the question under *H.J. Inc.* remains: Even if these mailings are "related" events, do they present the particular kind of "continuity" Congress sought to identify in RICO? How can a court, much less a prospective defendant, tell?

It is at this point in the analysis, we submit, that the Supreme Court's "more natural and commonsense approach" fits in. Such an approach calls for stepping back from technical descriptions of the facts in each case and asking what those facts, as a whole, say about likely "continuity." Common sense tells us that unless RICO applies to every process in which there are multiple mailings of allegedly misleading documents, there must be a ground for distinguishing certain allegedly fraudulent mailings that do *not* promise continuity under RICO. If, as *H.J. Inc.* says, Congress was truly "concerned in RICO with long-term criminal conduct," 109 S.Ct. at 2902, not every set of allegations of mail fraud portends it. A case premised on nothing more than a set of carbon-copy mail-

ings, and silent subsequent amendments that are required by law, seems a very likely candidate for such an assessment. A common sense approach might well suggest that, although this conduct is broken up into parts at the outset and then spread out over time, whatever wrongful conduct may have taken place only took place once, when the alleged misstatements and omissions were first made. And after *H.J. Inc.*, it is no longer dispositive, though it still remains relevant, that these mailings were part of a single discrete scheme with a well-defined terminating goal—the completion of the condominium sales.

Moreover, there can be no serious argument advanced that plaintiffs have alleged sufficient "continuity" on the ground that the facts pleaded show "an ongoing entity's regular way of doing business." 109 S.Ct. at 2902. Plaintiffs have alleged only two possible RICO "enterprises" that could conceivably serve as such an entity. One such entity is the alleged "enterprise" composed of all of "the defendants as a group . . . associated in fact." (Am. Compl. ¶ 106). But this "entity" has no "regular way of doing business" because the alleged "association" exists only in relation to the specific condominium sales program at issue, *i.e.*, apart from this sales program, it has no "way of doing business" at all, much less a "regular" way.

The second RICO "enterprise" alleged is Parkchester Apartments Co. ("PAC"), the sponsor of the condominium conversion. To be sure, Parkchester's marketing effort will "continue" and necessarily include further mailed amendments that do not make the corrections plaintiffs want. But if, as *H.J. Inc.* declares, "Congress was concerned in RICO with long-term criminal conduct" and courts are to adopt a "commonsense" approach with that Congressional purpose in mind, a "regular way of doing business" in the marketing context would seem to mean more than predictably silent amendments to one marketing plan that is alleged to be misleading at the

outset. In other words, although, in some contexts, a single scheme can satisfy the continuity requirement, when such a scheme is finite and consists of carbon-copy mailings and subsequent silent amendments, a pleading may be insufficient to show "continuity" unless it alleges *other similar marketing efforts.* Although *H.J. Inc.* makes clear that "multiple schemes" are not *always* a RICO pleading requirement, its emphasis upon the particular facts of each case leaves ample room to consider the absence of such multiplicity as a relevant factor in a "pattern" determination.

Absent a criminal organization, multiple schemes, or other factors that show a "regular way of doing business"—none of which are involved in this case—a court trying to decide whether RICO "continuity" exists on facts like those here, is necessarily trapped in the quicksand of vagueness. It does not offend the English language to say that this case involves some minimal kind of "continuity," reflected in the necessary unfolding of a project over time. But such barebones temporal continuity does not answer the question whether RICO "continuity," sufficient to satisfy the "pattern" requirement, exists. Put otherwise, events that necessarily take time do not, without more, portend "long-term criminal conduct" within the meaning of *H.J. Inc.* Standing alone, they are no better lodestar for pattern analysis than any other simplistic rule of the kind this Court so recently condemned.

Yet absent such a lodestar, or distinguishing factors like those set forth above, a court has no guide, other than intuition or guesswork, for determining when there is present the "something more" that is sufficient to brand related sequential events with the distinctive markings of a "pattern." But a law that licenses such intuition or guesswork is the essence of a "vague law [that] impermissibly delegates basic policy matters to judges and juries for resolution on an *ad hoc* and subjective basis,

with the attendant danger of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-9 (1972); *United States* v. *Kozminski*, 108 S.Ct. 2751, 2764 (1988); *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983); *United States* v. *Reese*, 92 U.S. 214, 221 (1876).

Because the particular facts of this case exemplify the kind of problem judges, and potential defendants, will face even after *H.J. Inc.*, this is an excellent vehicle for deciding the constitutional question raised by the concurring Justices in *H.J. Inc.* In a civil context, it presents an exemplary field upon which the vices of vagueness can be played out.

II. THE DECISION BELOW FAILS TO IMPLEMENT *H.J. INC.*

The Second Circuit's *en banc* opinion, issued prior to *H.J. Inc.*, was left untouched by the court of appeals after remand. It commits two errors condemned by this Court. It relies heavily upon the definitional elements found in 18 U.S.C. § 3575(e) not only to determine "relatedness" but also to establish "continuity."[6] The *H.J. Inc.* Court concluded that these factors were of "no assistance" beyond the "relatedness" element.

Perhaps more importantly, the *en banc* opinion fails to adopt the "commonsense" approach to the totality of the facts that *H.J. Inc.* mandates. It did correctly conclude that the absence of multiple schemes does not *preclude* a "pattern" finding. But the court of appeals failed altogether to recognize that, in a context where no regular course of conduct could otherwise be inferred, the pres-

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[6] The Second Circuit set forth its view of the relevance of § 3575(e) in the companion case decided along with this one. *United States* v. *Indelicato*, 865 F.2d 1370 (2d Cir. 1989) (*en banc*) (App. 20a). The *en banc* opinion in this case cross-refers to *Indelicato* in a manner that reflects its failure to distinguish between "relatedness" and "continuity" and thus fails properly to confine the role of § 3575(e) in pattern analysis. *See supra*, at 5-6.

ence of only a single, finite scheme does seriously weaken the "pattern" conclusion. Likewise, the *en banc* opinion failed to acknowledge that carbon-copy mailings, followed by required silent mailings, although not "isolated" or "sporadic" events, do not necessarily present the kind of "continuity" RICO meant to condemn.

Under *H.J. Inc.*, the court of appeals should have considered those particular factors that make this kind of case a special problem for RICO analysis even though the events involved are spread out over time.

In short, the *en banc* opinion, as reaffirmed, did not do what *H.J. Inc.* requires. It did not attend to the "specific facts of each case" with the "more natural and commonsense approach" necessary for RICO to catch only the conduct Congress sought to condemn when it established the "pattern" requirement.

CONCLUSION

Because this case presents a particularly apt vehicle, this petition for writ of certiorari should be granted to permit prompt decision by this Court of a question that will otherwise clog federal litigation—whether RICO, even in its civil applications, is unconstitutionally vague.

In the event that question is heard in another case, this one should be held for appropriate disposition thereafter. Alternatively, the petition should be granted to enforce the approach to "pattern" analysis that was set forth in *H.J. Inc.*, but inadequately implemented below.

Respectfully submitted,

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Dated October 10, 1989

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

July 3, 1989

Mr. Steven M. Umin
Williams & Connolly
839 17th St., N.W.
Washington, DC 20006

Re: Harry B. Helmsley, et al.,
v. Rosalyn O. Beauford, et al.
No. 88-1523

Dear Mr. Umin:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of H. J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. —— (1989).

Very truly yours,

/s/ Joseph F. Spaniol, Jr.
JOSEPH F. SPANIOL, JR.
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of September, one thousand nine hundred and eighty-nine.

87-7216

ROSALYN O. BEAUFORD, JOSEPH C. PALMENTO, MARIA VALLE, JOSEPH DECESARE, JR., and ELSIE DECESARE, individually and on behalf of others similarly situated,
Plaintiffs-Appellants,

v.

HARRY B. HELMSLEY, SUPERVISORY MANAGEMENT CORP., AVENUE OF AMERICA REALTY CORP., *et al.*,
Defendants-Appellees.

ORDER

[Filed September 15, 1989]

Upon further consideration in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), we adhere to our en banc decision in this case, 865 F.2d 1386 (2d Cir. 1989), and remand to the district court for further proceedings in accordance with the en banc decision.

FOR THE COURT:

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 40—August Term, 1987

(Argued: June 13, 1988 Decided: January 13, 1989)

Docket No. 87-7216

ROSALYN O. BEAUFORD, JOSEPH C. PALMENTO, MARIA VALLE, JOSEPH DECESARE, JR., and ELSIE DECESARE, individually and on behalf of others similarly situated,
Plaintiffs-Appellants,

—v.—

HARRY B. HELMSLEY, SUPERVISORY MANAGEMENT CORP., AVENUE OF AMERICA REALTY CORP., BENENSON CAPITAL CO., SANFORD G. BLUESTEIN, FELICE EARLEY, ESTATE ASSOCIATES, JOAN KONNER, PETER L. MALKIN, JOHN J. REYNOLDS, INC., SAUL S. SILVERMAN, WILLIAM C. WARREN, WILLIAM C. BREED III, RALPH W. FELSTEN, LILLIAN M. GELFMAN, ROBERT W. GELFMAN, DONALD L. JONAS, JEFFREY D. KLEIN, NORMAN R. KLEIN, ALVIN S. LANE, FRED LINDEN, GERTRUDE G. MALKIN, PETER L. MALKIN, CLAIRE W. MORSE, LESTER S. MORSE, JR., RICHARD P. MORSE, IVAN SHAPIRO, ALVIN SILVERMAN, HAROLD L. STRUDLER, BROWN, HARRIS, STEVENS, INC., MARCEL P. AILLERY, J. G. WHITE ENGINEERING CORP.,
Defendants-Appellees.

Before:

OAKES, *Chief Judge*,*

LUMBARD, FEINBERG,* MESKILL, NEWMAN, KEARSE, CARDAMONE, PIERCE, WINTER, PRATT, MINER, ALTIMARI and MAHONEY, *Circuit Judges*

En banc rehearing of panel decision, 843 F.2d 103 (1988), affirming a judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, 650 F. Supp. 548 (1986), dismissing civil RICO complaint, *see* 18 U.S.C. § 1964(c), for failure to allege a sufficient pattern of racketeering activity. *Held*: allegation that defendants made fraudulent mailings to thousands of persons and that such mailings were likely to continue sufficed to allege a RICO "pattern."

Panel decision and district court judgment vacated; matter remanded to district court.

Chief Judge Oakes dissents in a separate opinion, joined by Judge Lumbard and Judge Feinberg.

EDWARD S. KANBAR, New York, New York, *for Plaintiffs-Appellants.*

STEVEN M. HAYES, New York, New York (Mark S. Arisohn, Edward M. Chikofsky, Stanley Neustadter, Parcher Arisohn & Hayes, P.C., New York, New York, on the brief), *for Defendants-Appellees.*

GERALD B. LEFCOURT, P.C. (Gerald B. Lefcourt, Joshua L. Dratel, New York, New York, Walter P. Loughlin, Newark, New Jersey, of counsel), *for Amicus Curiae Marvin Kaplan.*

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* Judge Oakes succeeded Judge Feinberg as Chief Judge while this matter was sub judice.

KEARSE, *Circuit Judge*:

Plaintiffs Roslyn O. Beauford, *et al.*, appeal from a final judgment of the United States District Court for the Southern District of New York, Robert W. Sweet, *Judge*, dismissing their amended complaint which sought damages from defendants for mailings of allegedly fraudulent materials relating to the sale of condominium apartments, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1982 & Supp. IV 1986). The district court dismissed the amended complaint on the ground, *inter alia*, that it failed to state a claim upon which relief can be granted under RICO because it failed to allege a sufficient "pattern of racketeering activity," *see id.* § 1961 (5). A unanimous panel of this Court affirmed the decision of the district court, but suggested that the appeal be "reheard en banc to clarify Second Circuit law." *Beauford v. Helmsley*, 843 F.2d 103, 110 (1988). On rehearing, we conclude for the reasons stated below and in *United States v. Indelicato*, Nos. 87-1085, -1215, ("*Indelicato*"), heard *en banc* in tandem with the present case and published simultaneously herewith, that the amended complaint sufficiently alleged a pattern of racketeering activity. We therefore vacate the panel decision and the judgment of the district court and remand to the district court for further proceedings.

I. BACKGROUND

The present lawsuit, styled a class action, focuses on the conversion of a large Bronx, New York apartment complex known as "Parkchester" into condominiums. Parkchester comprises 51 buildings containing a total of 12,271 apartments; it is divided into the North, East, South, and West quadrants. It is principally the conversion of the East, West, and South quadrants ("EWS quadrants") that is at issue here.

Plaintiffs are one tenant of Parkchester who purchased his apartment and four tenants who did not. Defendants are the partners in Parkchester Apartments Co., which is the real estate partnership sponsoring the conversion, the sponsor's sales agent (all of the foregoing collectively referred to as the "sponsoring defendants"), and an engineering firm and an individual engineer (collectively the "engineering defendants") who supplied reports and studies as part of the conversion.

The amended complaint alleged that in connection with the offering plan for the conversion of the EWS quadrants, comprising 8,286 apartments, defendants made a number of material misrepresentations including the concealment of (a) serious structural defects in the buildings, (b) the presence of asbestos in their insulation, and (c) the need to replace their plumbing and electrical systems. The alleged means of concealment included material misstatements by the engineering defendants, failures to disclose by the sponsoring defendants, and absorption by the sponsoring defendants of certain repair costs in order to set forth artificially low maintenance levels for the apartments. Plaintiffs alleged that had they received accurate and complete information, their decisions whether or not to purchase condominiums would have been affected, and that defendants' frauds artificially inflated the purchase prices of the apartments.

In addition to alleging that defendants' conduct constituted common-law fraud, the amended complaint alleged that the frauds had been committed through the mailing of the conversion offering plans and plan amendments to tenants of all 8,286 apartments and to other potential buyers, in violation of 18 U.S.C. § 1341 (1982); that both the partnership itself and the defendants as a group constituted enterprises within the meaning of RICO, 18 U.S.C. § 1961(4); and that plaintiffs were entitled to recover under civil RICO, 18 U.S.C. § 1964(c).

In an opinion reported at 650 F. Supp. 548 (1986), the district court granted defendants' motion to dismiss the amended complaint for failure to state a federal claim on which relief could be granted because it failed to allege a pattern of racketeering activity. With respect to the RICO claim, the court stated as follows:

> Even assuming that plaintiffs have adequately alleged fraud, they have failed to adequately allege a "pattern" of racketeering, despite their conclusory description of the fraud as "several distinct schemes to defraud" both potential buyers and partners and investors. All alleged misrepresentations appear in one document, the offering plan for condominium conversion. Even under the most liberal reading of "pattern," the defrauding of potential buyers of condominium units by individually mailing them copies of a single fraudulent document and failing to remedy the fraud in subsequent amendments does not constitute a pattern of racketeering activity.

Id. at 551. Having also dismissed plaintiffs' only other alleged basis for federal-question jurisdiction, and there being no claim of diversity of citizenship, the court also declined to entertain plaintiffs' pendent state-law claims.

The court denied plaintiffs' motion for leave to file a second amended complaint that would have added allegations that defendants had, *inter alia*, denied claims by tenants based on water damage; misallocated expenses from one quadrant to another; destroyed documents; lowered the levels of services in categories such as hot water, electricity, elevators, painting, landscaping, and central mall maintenance; failed to disclose purchases of supplies through a related company; and engaged in discriminatory enforcement of regulations against tenants. The court was unpersuaded that the proposed new allegations would cure the amended complaint's failure to

allege a pattern of racketeering activity. Accordingly, judgment was entered dismissing the action.

On appeal, a panel of this Court affirmed the judgment of dismissal. We noted that the pattern of this circuit's RICO precedents was somewhat confusing, in that it had imposed a continuity requirement on the enterprise element and had

> f[ound] insufficient evidence of continuity in a single criminal episode regardless of how many fraudulent acts it entails. In other words, a single criminal episode or scheme does not charge a claim under RICO because it lacks sufficient continuity to constitute an enterprise, even if its fraudulent acts constitute a pattern.

843 F.2d at 110. We concluded that given our precedents, the present case was properly dismissed for lack of a RICO enterprise, stating that "a single alleged scheme" to defraud tenants and other prospective buyers is not sufficient to permit a plaintiff to take advantage of RICO where the scheme, though "widespread," is "discrete," and, though "continuing," is "finite." *Id.*

The panel recommended that the appeal be reheard *en banc* to clarify Second Circuit law, and this rehearing was joined with an *en banc* rehearing of an appeal from a judgment of conviction in *Indelicato*, which raises a similar issue with regard to the RICO requirement of a "pattern" of racketeering activity. For the reasons stated below and in *Indelicato*, we conclude that the amended complaint in the present case met the "pattern" requirement.

II. DISCUSSION

RICO § 1962(c) makes it unlawful, in pertinent part,

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or

> participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

18 U.S.C. § 1962(c). The terms "enterprise," "person," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961, in pertinent part, as follows:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of [18 U.S.C.]: . . . section 1341 (relating to mail fraud). . . .
>
> . . . .
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . .

Id. §§ 1961(1), (3), (4), and (5). A private right of action is provided for a person injured in his business or property by reason of a RICO violation. *Id.* § 1964(c).

A. *Our Prior Decision Interpreting "Pattern" and "Enterprise"*

In our accompanying opinion in *Indelicato,* we have explored at some length the course of this circuit's decisions, especially those in the aftermath of the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.,* 473

U.S. 479 (1985) ("*Sedima*"), interpreting the RICO concepts of "pattern" and "enterprise." As set forth in greater detail in Parts II.B. and C. of *Indelicato*, we held in *United States v. Ianniello*, 808 F.2d 184, 190-92 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987), that a RICO pattern of racketeering activity may be established simply by proof of two acts of racketeering activity. While recognizing that an inquiry must be made as to "relatedness" and "continuity," we concluded that these concepts did not affect the existence of pattern but rather were "best addressed in the context of the concept of 'enterprise.'" *Id.* at 191.

Thereafter, in a series of civil RICO cases, we adhered to *Ianniello*'s interpretation of pattern and further developed our notions of continuity with respect to the element of enterprise. In each of the civil cases discussed at greater length in Part II.C. of *Indelicato*, we found that the allegation of two or more acts of racketeering activity satisfied the pattern requirement, but we found insufficient continuity of enterprise. In *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 698 (1988), we found that a bank was not properly alleged to be a continuing RICO enterprise because its allegedly fraudulent scheme "had but one straight-forward, short-lived goal." *Id.* at 51. In *Furman v. Cirrito*, 828 F.2d 898, 902-03 (2d Cir. 1987), we held that the continuing enterprise element was not shown because the effect of the allegedly fraudulent acts was the dissolution of the partnership alleged to have been the enterprise. In *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987), we found that a company and its proprietor were not a continuing enterprise because their fraud "had an 'obvious terminating goal'" of inducing an insurance company to pay a false claim. *Id.* at 44 (quoting *Ianniello*, 808 F.2d at 192). In *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561 (2d Cir. 1988), we held that

an insurance company was not a sufficiently continuing RICO enterprise where it had "made three fraudulent representations in pursuit of a single short-lived goal" of selling four related insurance policies. *Id.* at 564. In *United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2035 (1988), we summarized our stands concisely: "So long as the defendants commit at least two predicate acts, they have met the pattern requirement and, so long as the enterprise is long and elaborate enough to be considered continuing, the enterprise requirement is satisfied." *Id.* at 72. Rarely in a civil RICO case was an enterprise found to be long enough and elaborate enough.

B. *Our Present Interpretations and the Present Complaint*

As discussed in Part II.E of *Indelicato*, our current review of the language and legislative history of RICO has led us to the conclusion, *inter alia*, that proof of two acts of racketeering activity without more does not suffice to establish a RICO pattern. Since Congress's goal in fashioning its definition of "pattern of racketeering activity" was to exclude from the reach of RICO criminal acts that were merely "isolated" or "sporadic," we must determine whether two or more acts of racketeering activity have sufficient interrelationship and whether there is sufficient continuity or threat of continuity to constitute such a pattern. Accordingly, our analysis of relatedness and contiruity has shifted from the enterprise element to the pattern element.

Within this framework, there is no question that the amended complaint in the present case adequately pleaded the RICO enterprise element. It alleged that there were two such enterprises: the partnership that sponsored the conversion, and all of the defendants in association with one another for the purpose of accomplishing the apartment sales. Each is within the statutory definition of

enterprise. The more interesting question is whether the amended complaint adequately alleged a pattern of racketeering activity.

Our *Indelicato* analysis has persuaded us that a RICO pattern may be established without proof of multiple schemes, multiple episodes, or multiple transactions; and that acts that are not widely separated in time or space may nonetheless properly be viewed as separate acts of racketeering activity for purposes of establishing a RICO pattern. Thus, in *Indelicato*, we found that three acts of murder could constitute a RICO pattern even though there was proof of but one scheme, and even though the three murders, carried out virtually simultaneously, could not be viewed as separable episodes or transactions. This analysis is equally applicable to the present case, for since a RICO violation is an element to be proven in a civil RICO action, the substantive standards as to what must be proven in a criminal RICO prosecution also govern civil RICO actions. *See Sedima*, 473 U.S. at 489 ("Section 1962 renders certain conduct 'unlawful'; § 1963 and § 1964 impose consequences, criminal and civil, for 'violations' of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections."). Applying these standards here, we can no longer say, as we once did, that there is "insufficient evidence of continuity," or of pattern, "in a single criminal episode regardless of how many fraudulent acts it entails." 843 F.2d at 110. We impose no multiple episode requirement, and we conclude that for a determination of whether there is a RICO pattern, each individual racketeering act should be separately counted.

In the present case, we concluded also that a RICO pattern may be adequately pleaded without an allegation that the scheme pursuant to which the racketeering acts were performed is an ongoing scheme having no demonstrable ending point. We reach this conclusion because

nothing in the statute or the legislative history reveals an intent to require such an open-ended scheme. What is required is that the complaint plead a basis from which it could be inferred that the acts of racketeering activity were neither isolated nor sporadic. In *Indelicato*, we found the threat of continuity inherent in the criminal nature of the enterprise at whose behest the three related murders were committed. Were the same type of enterprise alleged here, we would have no difficulty in finding a sufficient allegation of the threat of continuity needed to show a pattern: When, however, there is no indication that the enterprise whose affairs are said to be conducted through racketeering acts is associated with organized crime, the nature of the enterprise does not of itself suggest that racketeering acts will continue, and proof of continuity or the threat of continuity of racketeering activity must thus be found in some factor other than the enterprise itself. We conclude that the amended complaint alleged sufficient other factors with respect to continuity to avoid dismissal for failure to allege a RICO pattern.

The amended complaint alleged that the conversion of the apartments in the EWS quadrants in 1984 was commenced by means of an offering plan that was mailed to the tenants of 8,286 apartments as well as other potential buyers. The offering plan was alleged to have contained a number of material misrepresentations and omissions of material facts, concealing, *inter alia*, that the plumbing and electrical systems in all of the buildings needed to be replaced and that there were serious structural defects in some of the buildings. It was also alleged that since 1984 there had been several amendments to the offering plan which perpetuated the misrepresentations in the original offering plan, and that these amendments also were mailed to the tenants and potential buyers.

In assessing the sufficiency of these allegations to show a pattern, we note first that § 1961(1)(B) defines rack-

eteering activity, in pertinent part, as "any act which is indictable under . . . section 1341 (relating to mail fraud)," and that each act of fraudulent mailing is separately indictable, *see Badders v. United States*, 240 U.S. 391, 394 (1916) ("each putting of a letter into the post-office a separate offence" under predecessor of § 1341); *United States v. Eskow*, 422 F.2d 1060, 1064 (2d Cir.) (dictum), *cert. denied*, 398 U.S. 959 (1970). Second, there can be no question that the thousands of alleged mail frauds here had the necessary interrelationship to be considered a pattern. All of the mailings were made to groups of persons related by either their tenancy in Parkchester apartments or their potential interest in purchasing such apartments. All of the frauds allegedly had the same goal, *i.e.*, inflating the profits to be made by the defendants in the sale of the Parkchester apartments. *See Indelicato*, Nos. 87-1085, -1215, at 34 ("the simultaneous commission of like acts for similar purposes against a number of victims" may constitute a pattern).

Further, assuming that one could ever characterize more than 8,000 mailings as "isolated" or "sporadic" as a matter of law, which we doubt Congress would have envisioned, we interpret the amended complaint as containing sufficient other allegations to reveal continuity or the threat of continuity. Thus, that pleading suggested that further amendments to the 1984 offering plan were likely since some 40% of the EWS quadrant apartments remained unsold; as precedent, it alleged that although the conversion of the North quadrant was commenced in 1973, some 20% of the apartments in that quadrant remained unsold and the North quadrant offering plan had been repeatedly updated by amendments, most recently in 1986.

In sum, read with ordinary charity, the amended complaint alleged that on each of several occasions defendants had mailed fraudulent documents to thousands of persons and that there was reason to believe that similarly fraud-

ulent mailings would be made over an additional period of years. These allegations sufficed to set forth acts that cannot be deemed, as a matter of law, isolated or sporadic. We conclude that the relatedness and continuity factors have been adequately revealed in the pleading and that the amended complaint did not fail to satisfy the pattern requirement.

We hasten to add, however, that we do not regard any of the complaints filed or proffered by the plaintiffs in this case as well pleaded. While the complaints contained detail as to the alleged shortcomings in the defendants' performance as landlords and sellers, we doubt that they met the requirements of Fed. R. Civ. P. 9(b), which requires that fraud be pleaded with particularity. Accordingly, we suggest that the district court allow plaintiffs an additional opportunity to file a new pleading, preferably one that complies with all of the Federal Rules of Civil Procedure, including Rule 9(b) and Rule 8(a) (complaint should contain a "short and plain" statement of the claim). We of course express no view as to whether plaintiff's allegations of a RICO pattern, which we think sufficient at the pleading stage, will be sufficiently supportable to withstand a motion for summary judgment or whether the evidence will suffice to persuade a jury that such a pattern is in fact established.

We recognize that our reframing today of the enterprise and pattern requirements, and particularly our rejection of any requirements that there be multiple schemes or long-term goals or temporal separation of racketeering acts, will open the door to far more civil RICO cases than have heretofore survived our scrutiny. This more liberal approach is, however, required by the statute.

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States v. Turkette*,

> 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

Sedima, 473 U.S. at 497-98. And notwithstanding our own views that the RICO provisions cast too wide a net with respect to the civil actions that may be brought, *see also id.* at 499 ("[i]t is true that private civil actions under the statute are being brought almost solely against [respected and legitimate] defendants, rather than against the archetypal, intimidating mobster"), it is clear that Congress was aware that some persons having no association with organized crime would be ensnared by RICO. Thus, with respect to the list of criminal acts that could constitute predicate racketeering activities under RICO, Senator McClellan, sponsor of S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 827 (1969) (bill containing RICO), noted that a committee of the Association of the Bar of the City of New York had "complain[ed] that the list is too inclusive, since it includes offenses which often are committed by persons not engaged in organized crime." 116 Cong. Rec. 18940 (1970). The Senator responded that it was simply not possible to draw the statute in such a way that it would be sure to reach the organized crime activities that were targeted yet not reach others:

> The Senate report does not claim . . . that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime. That is all the title IX

list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

> Members of La Costa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. *It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.*

Id. (emphasis added). Thus, Congress made the legislative judgment, as it was entitled to do and which must be given deference, that in order to reach members of organized crime, it was worth reaching other offenders as well.

CONCLUSION

The decision of the panel is vacated; the judgment of the district court is vacated, and the matter is remanded to the district court for further proceedings not inconsistent with this opinion.

OAKES, *Circuit Judge* (dissenting):

I welcome the clarification of Second Circuit RICO law provided by today's two opinions: "Continuity" and "relatedness" are aspects of a "pattern of racketeering activity," and not of the "enterprise." However, I must still dissent in this case, for the actions alleged here constitute a single scheme that is discrete and finite. There is no continuity, or the threat of continuity; hence, there is no *pattern* of racketeering activity.

I continue to agree with the district court that since "[a]ll alleged misrepresentations appear in one document, the offering plan for condominium conversion," 650 F. Supp. at 551, there can be no "pattern." It does not matter how many people received that document or how

many amendments were mailed without remedying the original fraud. The alleged scheme has a discrete, finite nature even though it involved a very large condominium conversion lasting over a long period of time.

Two additional factors distinguish this case from *United States v. Indelicato.* The first is that the enterprises here, the sponsoring partnership and the individuals associating to sell the apartments, are not illegitimate enterprises such as the enterprise there, the Commission of La Costa Nostra. This does not exempt the enterprises here from RICO liability, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985), but it does affect the manner of proving the pattern of racketeering activity. In *Indelicato*, evidence concerning the nature of the enterprise also proved the existence of a pattern by showing relatedness and continuity. *See Indelicato* at 1 (Oakes, J., concurring). Here, however, that sort of evidence is unavailable.

The second factor distinguishing this case from *Indelicato* is the predicate acts involved—here alleged mail frauds, there murders to achieve Commission goals. As pointed out by Judge Cudahy:

> Mail fraud and wire fraud are perhaps unique among the various sorts of "racketeering activity" possible under RICO in that the existence of a multiplicity of predicate acts (here, the mailings) may be no indication of the requisite continuity of the underlying fraudulent activity. Thus, a multiplicity of mailings does not necessarily translate directly into a "pattern" of racketeering activity.

Lipin Enters Inc. v. Lee, 803 F.2d 322, 325 (7th Cir. 1986) (concurring opinion); *see also United States v. Horak*, 833 F.2d 1235, 1240 (7th Cir. 1987) (recognizing same). In this case, the mailing of copies of a single document to many people, followed by amendments that did not correct the alleged misstatements, may yield

many counts of mail fraud, but it does not suffice to show continuity.

To me, today's ruling pushes civil RICO to its logical extreme, a regrettable development. Any real estate conversion involving the mailing of an offering plan with one misrepresentation to apartment house tenants, coupled with the mailing of an amendment to the plan that fails to remedy the fraud, is now subject to civil RICO charges. This decision invites plaintiffs into federal court and arms them with a civil RICO that, for all practical purposes, is unlimited. In many cases, reliance on tort or contract law, or any resort to the state courts, will become unnecessary. The majority has declined to accept the Supreme Court's invitation to "develop a meaningful concept of 'pattern,'" *Sedima*, 473 U.S. at 500, and would instead, in its own words, "open the door to far more civil RICO cases than have heretofore survived our scrutiny." (Majority opinion at 16.) Accordingly, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 98, 106—August Term, 1987

(Argued: June 13, 1988 Decided: January 13, 1989)

Docket Nos. 87-1085, -1215
(87-1075 L)

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTHONY INDELICATO,
Defendant-Appellant.

Before:

OAKES, *Chief Judge,**
FEINBERG,* MESKILL, NEWMAN, KEARSE,
CARDAMONE, PIERCE, WINTER, PRATT, MINER,
ALTIMARI, and MAHONEY, *Circuit Judges*

En banc hearing on appeal from judgment of conviction entered in the United States District Court for the Southern District of New York, Richard Owen, *Judge*, convicting defendant of participating and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, 18 U.S.C. §§ 1962(c) and (d).

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* Judge Oakes succeeded Judge Feinberg as Chief Judge while this matter was sub judice.

Held: proof that defendant participated in commission of three nearly simultaneous murders at behest of organized crime group sufficed to establish RICO "pattern." Matter remanded to panel for further proceedings consistent herewith.

Chief Judge Oakes concurs in a separate opinion, joined by Judge Feinberg. Judge Mahoney concurs in a separate opinion.

JOHN F. SAVARESE, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Aaron Marcu, John Gilmore Childers, Assistant United States Attorneys, Michael Chertoff, Special Assistant United States Attorney, New York, New York, on the brief), *for Appellee.*

MARK F. POMERANTZ, New York, New York (Ronald P. Fischetti, Warren L. Feldman, David T. Grudberg, Fischetti & Pomerantz, New York, New York, on the brief), *for Defendant-Appellant.*

GERALD B. LEFCOURT, P.C. (Gerald B. Lefcourt, Joshua L. Dratel, New York, New York, Walter P. Loughlin, Newark, New Jersey, of counsel), *for Amicus Curiae Marvin Kaplan.*

KEARSE, *Circuit Judge*:

Defendant Anthony Indelicato has appealed from a judgment entered in the United States District Court for the Southern District of New York, after a jury trial before Richard Owen, *Judge*, convicting him of participating and conspiring to participate in the affairs of an enterprise and conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Or-

ganizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (1982 & Supp. IV 1986). He was sentenced to two consecutive 20-year terms of incarceration and a $50,000 fine. His appeal and the appeals of his codefendants were heard by a panel of this Court and remain pending before that panel. We granted this rehearing *en banc* in order to consider the limited question of whether Indelicato's participation in three murders as part of a single criminal transaction would constitute a "pattern of racketeering activity" within the meaning of RICO, 18 U.S.C. § 1961 (5). For the reasons below, we answer that question in the affirmative, and we remand the matter to the panel for further proceedings consistent with this holding.

I. BACKGROUND

Indelicato was charged in two counts of a 25-count superseding indictment charging him and seven codefendants with various crimes arising out of operations of an organization known as the "Commission" of La Cosa Nostra, which was alleged to be the ruling body of the La Cosa Nostra organized crime families throughout the United States. The Commission was alleged to be a RICO enterprise, and Indelicato was charged with one count of participating in, and one count of conspiring to participate in, the affairs of the Commission through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c) and (d), respectively.

To the extent pertinent to the question considered in this *en banc* rehearing, the evidence at trial, taken in the light most favorable to the government, revealed the following. The Commission had existed for decades as the governing body of the five La Cosa Nostra families in New York City and affiliated families in other cities. Each organized crime family included a "boss" or leader, assisted by an underboss and a counselor; beneath this level were "capos" or captains, who supervised a number of people who had been made "members" or "soldiers" of the family. To be made a member of such a family, one was

required to vow obedience to the rules and orders of the Commission and to be personally approved by it for admission. The functions of the Commission included overseeing interfamily ventures and intrafamily leadership disputes. The prior approval of the Commission was required before any family boss could be killed.

The Commission consisted principally of the bosses of the five organized crime families in the New York City area. During most of the 1970's, however, it did not include a representative of one such family, the Bonanno organized crime family ("Bonanno family"), because of leadership disputes within that family. During this period, the Commission itself directly controlled the operations of the Bonanno family.

In 1979, the boss of the Bonanno family was Carmine Galante. Indelicato was a member of the family; his father was a capo; and an uncle, J.B. Indelicato, was a member. As part of an overall plan to end the factional disputes within the Bonanno family and to realign its leadership, the Commission planned and implemented the murder of Galante and two of his close associates.

In planning the murder of Galante, the Commission worked through Aniello Dellacroce, underboss of the Gambino organized crime family, Stefano Canone, the counselor of the Bonnano family, and several soldiers in the Bonanno family including Indelicato, Dominic Trinchera, and Cesare Bonventre. Thus, in May or June 1979, Trinchera introduced Indelicato to one Louis Giongetti, a lifelong felon. Indelicato asked Giongetti whether he had ever "hit," *i.e.*, killed, anyone. Giongetti assured Indelicato that he was experienced and trustworthy. In early July, Indelicato and Trinchera met in a bar with Giongetti; Trinchera sent Giongetti to a "safe house" to retrieve a cache of shotguns and other weapons.

On July 12, 1979, Indelicato and two other men, all wearing ski masks, entered a restaurant in Brooklyn, New

York, where Galante, his cousin Guiseppe Turano, and Galante's friend and associate Leonard Coppola were having lunch. Using guns of the types earlier amassed at the bar, Indelicato and his two companions shot and killed Galante, Turano, and Coppola. The victims were shot numerous times at close range with several weapons. The evidence also showed that two other men, including Bonventre, who had accompanied Coppola to lunch and were uninjured in the shootings, had joined in shooting Coppola, Turano and Galante.

Indelicato and his two companions fled in a car stolen a month earlier. After abandoning that car, Indelicato immediately went with his father, his uncle J.B., and Phillip Giaccone, another Bonanno family capo, to a social club in Manhattan to report his success to Dellacroce and Canone. A surveillance videotape showed Indelicato being congratulated by Canone.

Thereafter, Indelicato remained involved with the Commission. He, Trinchera, and Bonventre were promoted to the rank of capo. Indelicato maintained that rank until at least 1981.

The three murders were the only RICO predicate acts alleged against Indelicato. He was not named in any of the remaining 23 counts of the indictment. The proof at trial relating to the three murders included, in addition to the above, ballistics and medical forensic evidence, eyewitness evidence, and Indelicato's palm print on an inside door handle of the getaway car. Indelicato was convicted on both of the counts against him. His appeal and the appeals of his codefendants were heard before a panel of this Court in September 1987, and those appeals remain pending.

Indelicato's principal argument on appeal is that proof of his commission of, or agreement to commit, three murders as part of a single criminal transaction is insufficient to establish a "pattern of racketeering activity" within the

meaning of RICO. In April 1988, we agreed to rehear this issue *en banc*, in tandem with an *en banc* rehearing of *Beauford v. Helmsley*, 843 F.2d 103 (1988). For the reasons below, we conclude that the facts proven by the government are sufficient to establish a RICO pattern.

II. DISCUSSION

RICO § 1962(c) makes it unlawful, in pertinent part,

> for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.

18 U.S.C. § 1962(c). Section 1962(d) makes it unlawful to conspire to violate §§ 1962(a), (b), or (c). The terms "enterprise," "racketeering activity," and "pattern of racketeering activity" are defined in 18 U.S.C. § 1961, in pertinent part, as follows:

> (1) "racketeering activity" means (A) any act or threat involving [*inter alia*] murder, kidnaping, gambling, arson, robbery, bribery, extortion, . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 224 (relating to sports bribery), . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . section 1952 (relating to racketeering), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property), . . . (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving . . .

> the felonious manufacture, importation, . . . or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .
>
> . . . .
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity; . . . .

18 U.S.C. §§ 1961(1), (4), and (5).

Our assessment of Indelicato's contention that his commission of three murders as part of a single criminal episode or transaction cannot be considered a RICO "pattern" requires a review of the development of Second Circuit doctrine as to the RICO concept of pattern both before and after the Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) ("*Sedima*").

A. *Early Second Circuit Interpretations of "Pattern"*

Following the enactment of RICO, few cases in this Court required us to focus closely on the meaning and content of the statutory definition of "pattern of racketeering activity." In those that did, we generally gave "pattern" a generous reading.

In *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), we considered a conviction under 18 U.S.C. § 1962(b), which makes it unlawful to, *inter alia*, acquire an interest in or control of an enterprise through a pattern of racketeer-

ing activity. A defendant convicted of gaining control of a hotel in violation of this section contended that there was insufficient proof of the requisite number of acts of racketeering activity to constitute a pattern. We affirmed the conviction, noting that on February 4, 1971, this defendant had caused the interstate transport of stolen funds, in violation of 18 U.S.C. § 2314 (1970); that on February 4, he had caused the victim of his scheme to travel in interstate commerce to pick up two checks representing the stolen funds, also in violation of § 2314; and that on February 9, the defendant had caused the interstate transport of an additional check representing stolen funds, in violation of the same section. We concluded that a RICO pattern had been adequately proven: "Parness was charged with and convicted of three separate violations of § 2314. . . . Convictions on any two of these counts were sufficient under § 1961(5) to establish the 'pattern of racketeering activity' necessary for a conviction under § 1962(b)." 508 F.2d at 438.

Shortly thereafter, the district court in *United States v. Moeller*, 402 F. Supp. 49 (D. Conn. 1975), interpreting the statement that "any two" of the *Parness* acts sufficed to establish a RICO pattern as a ruling that even the very closely related acts that occurred on the same day constituted a pattern, expressed its skepticism: "While the statutory definition makes clear that a pattern can consist of only two acts, I would have thought the common sense interpretation of the word 'pattern' implies acts occurring in *different criminal episodes*, episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity." *Id.* at 57 (emphasis in original). On the authority of *Parness*, however, the court concluded that the kidnaping of three employees who worked in a building, followed by arson on the building on the same day, could constitute a RICO pattern in a prosecution under § 1962(c). *Id.* at 58.

In the meantime, the district court in *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd on other grounds*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), confronted with an attack on the constitutionality of RICO as impermissibly vague, sought to give precise content to the pattern element. The court noted that 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 473, tit. II, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031, entitled "Increased Sentence for Dangerous Special Offenders" and enacted, like RICO, as part of the Organized Crime Control Act of 1970, specified that a "pattern of criminal conduct" exists when "criminal acts . . . have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events"; it concluded that the interpretation of "pattern of racketeering activity" in RICO should be similar. Accordingly, it stated that to constitute a RICO pattern, "the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." 409 F.fl Supp. at 614. This Court, in affirming the eventual judgments of conviction, was not called upon to address the district court's interpretation of the "pattern" requirement.

In *United States v. Weisman*, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980), we substantially undercut *Stofsky*'s interpretation of the pattern requirement, for we rejected the defendants' contention that the jury should have been charged that it could not find a RICO pattern on the basis of two predicate acts "unless the predicate acts were also found to be 'related' to each other through a 'common scheme, plan or motive.'" *Id.* at 1121. Weisman was convicted of a number of offenses, including nine counts of securities fraud committed in 1973, nine counts of bankruptcy fraud in connection with the financial problems of a theatre opened in 1975, and

one count of participating in the affairs of an enterprise through a pattern of racketeering, in violation of § 1962 (c). He contended that no RICO pattern had been proven because, *inter alia*, the securities frauds (which the trial court had charged the jury could constitute only a single predicate act because they arose "out of the same episode," *id* at 1125 n.5) and the bankruptcy frauds were not related to each other. We rejected this contention both on the facts and in principle.

Without commenting on the trial court's "same episode" theory, we concluded that even counting the nine securities frauds as one act, the securities fraud and bankruptcy frauds were all related to the theatre and could "constitute ten separate predicate acts of racketeering, any two of which would be sufficient to sustain the conviction on the RICO count." *Id.* at 1124. Noting that if a direct relationship between the acts were required, it had been amply proven by reason of similarity of victims, goals, and methods, *id.* at 1123 n.4, we stated that "the statutory language does not expressly require that the predicate acts of racketeering be specifically 'related' to each other." *Id.* at 1122. We agreed with Weisman that RICO was not intended to apply to sporadic and unrelated criminal acts, but we concluded that where each act was related to the conduct of the affairs of a RICO enterprise, the jury was entitled to find a RICO pattern. *Id.* ("the enterprise itself supplies a significant unifying link between the various predicate acts specified in section 1961 (1) that may constitute a [RICO] 'pattern' ").

Following our *Weisman decision*, we ruled that predicate acts related to an enterprise were sufficient to support a conviction under § 1962(c) even though they were not in furtherance of the enterprise, where the defendant used his position in the enterprise to commit those acts. *See United States v. LeRoy*, 687 F.2d 610, 616-17 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); *United States v. Scotto*, 641 F.2d 47, 53-55 (2d Cir. 1980), *cert. denied*,

452 U.S. 961 (1981). In *LeRoy*, we held that a pattern was established by proof that the defendant had committed "more than two" violations of 29 U.S.C. § 501(c) (1976) or 29 U.S.C. § 186 (1976). 687 F.2d at 617. In *Scotto*, we held that the jury was properly instructed that in order to find a RICO pattern it needed to find that the defendant had committed "two or more" of the alleged violations of § 186.641 at 54-55.

In *United States v. Mazzei*, 700 F.2d 85 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983), we upheld a conviction under § 1962(c) in which the enterprise was a group of persons associated in fact who traveled in interstate commerce in order to bribe contestants in various college basketball games, and the RICO pattern was defendants' attempts to influence the outcome of those basketball games, in violation of 18 U.S.C. § 224 (1976), and their interstate travel in aid of that goal, in violation of 18 U.S.C. § 1952 (1976). Mazzei contended that no RICO violation had been shown because the alleged enterprise was indistinguishable from the alleged pattern of racketeering activity. We rejected this contention, ruling that the pattern and the enterprise need not be totally "distinct and independent, as long as the proof offered is sufficient to satisfy both elements." 700 F.2d at 89. *See also Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 22 (2d Cir. 1983) (rejecting district court's view that plaintiff in private RICO action brought under 18 U.S.C. § 1964(c) was required to allege facts showing that the enterprise had an " 'independent economic significance from the pattern of racketeering activity' " (quoting 553 F. Supp. 1347, 1363 (S.D.N.Y. 1983)), *cert. denied*, 465 U.S. 1025 (1984).

Thus, prior to the Supreme Court's 1985 decision in *Sedima* and our interpretation of *Sedima* in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3229 (1987), this circuit had liberally construed the RICO pattern element as not requiring, in connection with § 1962(c), that the predicate acts be "specifically"

related to each other, so long as they were related to the conduct of the affairs of the enterprise, and as not requiring, in connection with § 1962(b), that the predicate acts be separated in time or place or be parts of separable episodes of in furtherance of different schemes.

In the meantime, as discussed below, this Court gave more restrictive interpretations in civil RICO cases to other preconditions to recovery, which led to the Supreme Court's decision in *Sedima*.

B. Sedima's *Footnote 14* and Ianniello's *Interpretation of It*

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, the Supreme Court considered for the first time the civil action provisions of RICO, reversing a decision of this Court which held that a civil action could not be maintained unless (1) the defendant had already been convicted of a predicate racketeering act or of a RICO violation, and (2) the plaintiff could show special racketeering injury. *See Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985); *see also Bankers Trust Co. v. Rhoades*, 741 F.2d 511 (2d Cir. 1984) (plaintiff required to show injury flowing from "pattern" rather than from individual racketeering acts), *vacated and remanded*, 473 U.S. 922 (1985). The *Sedima* Court observed that

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see *United States v. Turkette*, 452 U.S. 576, 586-87 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947,

473 U.S. at 497-98, and it concluded that recovery in a civil RICO action did not require proof of either a prior conviction or a special type of injury.

In discussing the nature of the injury that must be shown, the Supreme Court noted that the civil RICO plaintiff must allege the defendant's (1) conduct (2) of an enterprise (3) through a pattern"[14] (4) of racketeering activity," 437 U.S. at 496, and that the statute requires no more than this, *id.* at 497. Footnote 14, which discussed the nature of the "pattern" requirement and its relationship to individual acts of racketeering activity, stated as follows:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires* at least two acts of racketeering activity," § 1961(5) (emphasis added), not that it "means" two acts. The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern." The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969) (emphasis added). Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship . . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern . . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan) . . . . Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "[C]rim-

> inal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e). This language may be useful in interpreting other sections of the [Organized Crime Control] Act.

Id. at 496 n.14 (emphasis in *Sedima*).

In discussing the relationship between "pattern" and "enterprise" in *United States v. Turkette*, 452 U.S. 576 (1981), the Court had stated as follows:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. [§ 1961(1).] The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.
>
> *Id.* at 583.

In *United States v. Ianniello*, 808 F.2d 184, we affirmed convictions under § 1962(c) in connection with

the defendants skimming of profits from several New York City restaurants and bars and their fraudulent procurement of liquor licenses in aid of that practice. On appeal, the defendants argued, *inter alia*, (1) that our decision in *Weisman*, 624 F.2d 1118, should be reconsidered in light of *Sedima's* statement in footnote 14 that two acts are necessary but not sufficient to constitute a RICO pattern, and (2) that two acts of mail fraud in the procurement of liquor license renewals in successive years were parts of a single scheme and thus could not, as a matter of law, constitute a pattern. We rejected both contentions.

We declined to reconsider *Weisman*, stating (a) that *Sedima* did not address *Weisman*, (b) that the *Sedima* footnote's observation that separate acts must exhibit some combination of relationship and continuity in order to constitute a pattern was not inconsistent with *Weisman*, and (c) that in any event "[b]ecause the *Sedima* footnote does not rise to the level of a holding, it is not controlling," 808 F.2d at 190. *Ianniello* therefore stated its adherence to *Weisman*, which it read as holding "that two predicate acts can suffice to satisfy the pattern requirement of RICO." *Id.* Since *Weisman* had indicated that the requisite relationship between racketeering acts could be found in the fact that each of them was related to a RICO enterprise, *Ianniello* concluded that "the inquiry as to relatedness and continuity," which *Sedima* suggested should be made in assessing whether there is a pattern, "is best addressed in the context of the concept of 'enterprise.'" *Id.* at 191.

On the facts before us in *Ianniello*, we concluded that continuity of enterprise was adequately shown:

> an enterprise with "a single purpose," here fraud continuing indefinitely, can provide the basis for a section 1962(c) violation. The common purpose in this case was to skim profits and had no obvious

> terminating goal or date, clearly establishing the enterprise requirement.

Id. at 191-92. We also rejected the contention that evidence of two racketeering acts in pursuit of a single unlawful goal is insufficient to prove a RICO pattern and that establishment of more than one unlawful scheme is necessary:

> Instead, we hold that when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise with which that person is associated, the elements of relatedness and continuity which the *Sedima* footnote construes section 1962(c) to include are satisfied.

Id. at 192; *see also id.* n.16 ("definition of pattern requires at least two acts of racketeering activity, not two schemes").

1. *This Circuit's Post-*Ianniello *Decisions*

In the wake of *Ianniello*, the district courts of this circuit divided over whether the *Ianniello* holding that two predicate acts sufficed to satisfy the pattern requirement applied in civil RICO actions. Some held that the same rules apply in both criminal and civil RICO cases, *e.g.*, *City of New York v. Joseph L. Balkan, Inc.*, 656 F. Supp. 536, 544-45 (E.D.N.Y. 1987), while others held that *Ianniello*'s holding was limited to cases involving wholly criminal enterprises, *e.g.*, *Franklin & Joseph, Inc. v. Continental Health Industries, Inc.*, 664 F. Supp. 719, 723-24 (S.D.N.Y. 1987). *See generally Furman v. Cirrito*, 828 F.2d 898, 908-09 (2d Cir. 1987) (Pratt, *J.*, dissenting and listing cases).

In a series of appeals from dismissals of civil RICO complaints, we clarified that *Ianniello's* ruling that two predicate acts suffice to establish a RICO pattern does apply to civil RICO actions. In addition, we added gloss

to *Ianniello*'s imputation of the continuity requirement to the enterprise element.

In *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46 (2d Cir. 1987) (*"Beck"*), *cert. denied*, 108 S. Ct. 698 (1988), the plaintiffs brought a civil RICO action complaining that the defendant bank, an indenture trustee, had breached its fiduciary duties by fraudulently making certain interest payments, selling collateral at a reduced price, and disposing of the proceeds. As predicate acts of racketeering activity, the complaint alleged that the bank had committed numerous mail frauds, in violation of 18 U.S.C. § 1341, and wire frauds, in violation of 18 U.S.C. § 1343 (1982). The district court dismissed the complaint for, *inter alia*, failure to plead a valid RICO pattern, on the ground that the alleged racketeering acts were part of a single episode and that *Sedima*'s footnote 14 interpretation of RICO pattern required proof of "multiple episodes." We rejected this interpretation of the pattern requirement as foreclosed by *Ianniello*:

> It is clear after *Ianniello* that the District Court erred in interpreting "pattern of racketeering activity" to require multiple episodes. *Ianniello* confirms that two related predicate acts will suffice to establish a pattern under 18 U.S.C. § 1961(5). [808 F.2d] at 189-90. Plaintiffs' amended complaint pleads at least two related acts of mail and wire fraud with regard to the sale of the U.S. collateral and therefore satisfies the pleading requirement for "pattern of racketeering activity."

820 F.2d at 51.

Nonetheless, noting that, "[a]s *Ianiello* recognized, whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance," *id.*, we affirmed the dismissal of the *Beck* complaint, concluding that it did not adequately allege a RICO enterprise. We noted that *"Ian-*

niello emphasizes that a plaintiff must prove the existence of a *continuing* enterprise" or "'*continuing operation*'" under § 1962(c), by showing "'an *ongoing organization*,'" and "'evidence that the various associates function as a *continuing unit*.'" 820 F.2d at 51 (quoting *Ianniello*, 808 F.2d at 191 (quoting *Turkette*, 452 U.S. at 583)) (emphasis in *Beck*). We conclude that because the enterprise alleged by the *Beck* plaintiffs, insofar as the complaint adequately pleaded any fraud, had "had but one straightforward, short-lived goal," *i.e.*, the sale of the collateral at a reduced price, and had ceased to function at the conclusion of that sale, the alleged "association is not sufficiently continuing to constitute an 'enterprise.'" 820 F.2d at 51.

Beck was followed by *Furman v. Cirrito*, 828 F.2d 898, a lawsuit between the principals in a dissolved limited brokerage partnership that was alleged to have been a RICO enterprise. The plaintiffs aleged that they had been the victims of mail fraud in connection with the sale of partnership assets negotiated by the defendants. We affirmed the dismissal of the complaint. Contrasting the continuity requirements found in *Ianniello* and *Beck* with the complaint's allegation that the partnership had been dissolved, the *Furman* majority affirmed the dismissal on the ground that, even assuming that plaintiffs had "spelled out some form of criminal fraud on [defendants'] part, they have not alleged a pattern of racketeering activity conducted in the affairs of an 'enterprise'" that would have the requisite continuity. *Id.* at 902. The majority reasoned that although partnerships are expressly mentioned in the definition of enterprise, "since the effect of [defendants'] acts was to remove [the parties' partnership] from the very definition of enterprise, the requirement of continuity was not satisfied." *Id.* at 903.

In dissent, Judge Pratt criticized both the *Furman* majority opinion and the *Beck* decision as inconsistent

with *Ianniello*. The dissent diagreed with the majority's apparent view that the sale of the partnership could not be part of the conduct of the partnership's affairs, and concluded that the majority's ruling that the dissolution of the partnership eliminated the requisite continuity of enterprise had the effect of equating enterprise with racketeering activity. *Id.* at 907-08. The dissent also concluded that when *Beck* required multiple or extended goals in order to make the enterprise a continuing enterprise, it misidentified the enterprise as the activity and "undercut[] *Ianniello* by putting back into the RICO stew the multiple-episode ingredient that *Ianniello* sought to remove." *Id.* at 908.

In *Albany Insurance Co. v. Esses*, 831 F.2d 41 (2d Cir. 1987), we affirmed the dismissal of a civil RICO complaint which, together with a proposed amendment, charged that the corporate defendant and its owner had committed arson and mail fraud in order to obtain payment of a false insurance claim. Noting that *Ianniello* had affirmed the convictions there at issue because the profit-skimming enterprise had " 'no obvious terminating goal or date,' " *id.* at 44 (quoting *Ianniello*, 808 F.2d at 192), and that *Beck* had affirmed the dismissal of a civil RICO complaint because of the enterprise's " 'straightforward, short-lived goal,' " 831 F.2d at 44 (quoting *Beck*, 820 F.2d at 51), we concluded that the *Albany* defendants did not constitute a sufficiently "continuing" enterprise because their activity "had an 'obvious terminating goal' " of inducing the insurer to pay a false insurance claim. 831 F.2d at 44.

In *United States v. Benevento*, 836 F.2d 60 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2035 (1988), we affirmed a RICO conviction under § 1962(c) in which the enterprise was a corporation formed for the purpose of manufacturing and distributing narcotics, and two of the predicate acts alleged were a conspiracy to manufacture and distribute narcotics in violation of 21 U.S.C. § 846

(1982), and a conspiracy to import one of the necessary ingredients into the United States in violation of 21 U.S.C. § 963. Carmine Loiacono, the defendant thus convicted, contended that the two conspiracies could not be deemed separate acts of racketeering activity because they were part of the single overall narcotics scheme. We disagreed. Noting that the differences between the two conspiratorial offenses meant that a defendant could be held guilty of either, neither, or both, we concluded that

> [t]he fact that Loiacono committed both crimes as part of a single plan does not invalidate the RICO conviction, since this circuit has rejected the view that a pattern of racketeering activity or a racketeering enterprise must consist of multiple ventures or plans. So long as the defendants commit at least two predicate acts, they have met the pattern requirement and, so long as the enterprise is long and elaborate enough to be considered continuing, the enterprise requirement is satisfied.

836 F.2d at 72 (citing *Beck* and *Ianniello*).

In *Creative Bath Products, Inc. v. Connecticut General Life Insurance Co.*, 837 F.2d 561 (2d Cir. 1988), we considered a complaint by two related companies and their two principals alleging that the defendants had made three misrepresentations in the sale to the companies of four insurance policies on the lives of the companies' principals. The district court had dismisesd for insufficient allegation of a RICO pattern. We noted that this was "probably" error in light of *Ianniello*; but we affirmed the dismissal on the ground that the complaint failed to show the requisite continuity of enterprise:

> [P]laintiffs' case consisted of the proposition that defendants had made three fraudulent representations in pursuit of a single short-lived goal, *i.e.*, the sale to Creative Bath and its affiliated company of

> the four insurance policies on the lives of the two partners. The RICO claim is not distinguishable in a meaningful way from those claims whose dismissals were upheld in *Beck* and *Albany*. Accordingly, we affirm the judgment of dismissal.

Id. at 564.

Finally, in *Beauford v. Hemsley*, 843 F.2d 103, which was reheard *en banc* with the present case, we affirmed the dismissal of a civil RICO complaint alleging that the defendants had committed mail fraud in connection with offering for sale 8,286 apartments that were being converted into condominiums. The alleged racketeering activity was said to be the mailing of fraudulent offering plans to the tenants of the apartments, as well as to others, and the later mailing of plan amendments to those persons. We stated that our precedents were confusing but seemed to require that conclusion that "a single alleged scheme to defraud buyers, tenants, and the authorities overseeing the laws pertaining to" the conversion is not sufficient to allege a RICO enterprise "regardless of how many fraudulent acts it entails." We concluded that the *Beauford* complaint was properly dismissed for lack of a RICO enterprise because the scheme, though "widespread," was "discrete," and, though "continuing," was "finite." *Id.* at 110.

D. *Other Circuits' Interpretations of "Pattern" and "Enterprise"*

Other circuits have dealt with *Sedima*'s footnote 14 and the requirements of relationship and continuity in other ways. None has interpreted "enterprise" in the way we have; all have remained focused on "pattern."

The Eighth Circuit has adopted the view that a civil RICO plaintiff cannot establish a RICO pattern merely by showing that the defendant has committed a number of racketeering acts pursuant to a single scheme. Rather,

he must show that the defendant has engaged in more than one scheme. *E.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988); *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

The Seventh Circuit has adopted a standard that requires neither multiple schemes nor a continuing enterprise but does appear to require that the predicate acts have occurred in separate transactions. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the court considered a claim that the defendants had defrauded the plaintiff investors over a period of some four years through mail fraud in connection with a loan transaction and two separate foreclosures. The court considered the acts to be part of a single grand scheme but to have sufficient continuity to constitute a RICO pattern because they were "ongoing over an identified period of time so that they [could] fairly be viewed as constituting separate transactions, *i.e.*, 'transactions "somewhat separated in time and place."'" *Id.* at 975 (quoting *Graham v. Slaugher*, 624 F. Supp. 222, 225 (N.D. Ill. 1985) (quoting *United States v. Moeller*, 402 F. Supp at 57)). The *Morgan* court also noted its adherence to *Lipin Enterprises v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986), which had held that "multiple predicate acts" over the course of several months did not satisfy the continuity aspect of the RICO pattern requirement because the acts were in furtherance of a single scheme to acquire a single large block of stock from a single victim and hence resulted in only a single injury. *See* 804 F.2d at 976-77.

In contrast, the Eleventh Circuit ruled that a series of predicate acts related to one fraudulent scheme or criminal episode can constitute a pattern, stating that the standard of that circuit is that each act is a separate predicate act for pattern purposes if it constitutes a separate violation of federal or state law listed in § 1961(1)

" 'irrespective of the circumstances under which [the acts] arose.' " *Bank of America National Trust & Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986) (quoting *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985), *cert. denied*, 474 U.S. 1100 (1986)). In *Watchmaker*, the court held that three simultaneous shootings constituting attempted murders, committed in the conduct of the affairs of an enterprise whose business was crime, could constitute a RICO pattern.

A number of other circuits have proceeded without enunciating a precise test. *See, e.g., United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988) (stating obiter that two acts charged as part of a single count of an indictment may constitute the predicate acts needed to support a RICO conviction); *United States v. Licavoli* 725 F.2d 1040, 1047 (6th Cir.) (murder and conspiracy to commit that murder may constitute the requisite predicate acts), *cert. denied*, 467 U.S. 1252 (1984); *Sun Savings & Loan Ass'n v. Dierdoff*, 825 F.2d 187, 194 (9th Cir. 1987) (series of acts that were part of single scheme constituted a RICO pattern because they posed threat of continuing activity); *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 30-31 (1st Cir. 1987) (several acts of mail and wire fraud in furtherance of a single isolated bribe (paid in three installments) did not constitute a pattern); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 154-55 (4th Cir. 1987) (single limited scheme found not sufficient); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985) (two related acts of mail fraud would suffice to satisfy pattern requirement). *See generally* Abrams, *Civil RICO's Cause of Action: The Landscape After Sedima*, 12 Tul. Mar. L.J. 19, 41-51 (1988).

E. *"Pattern" and "Enterprise" Revisited*

It is in this posture that today's *en banc* issue arises. This circuit, alone among all the circuits, has held that a RICO pattern of racketeering activity may be established

simply by proof of two acts of racketeering activity, but that a RICO enterprise is not established unless there is proof that it is ongoing and that there is more than a single scheme having no demonstrable ending point. For the reasons below, we conclude today that proof of two acts of racketeering activity without more does not suffice to establish a RICO pattern; that the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise, and that a RICO pattern may not be established without some showing that the racketeering acts are interrelated and that there is continuity or threat of continuity; that a pattern may be established without proof of multiple schemes, multiple episodes, or multiple transactions; and that racketeering acts that are not widely separated in time or space may nonetheless, given other evidence of the threat of continuity, constitute a RICO pattern.

To begin with, we note that though we disagree with the doctrinal treatment that followed, *Ianniello* correctly characterized *Sedima*'s footnote 14 as dictum. The Supreme Court was not presented with an issue as to whether or not a RICO pattern had been established but only with whether RICO required (a) a prior conviction or (b) some special type of injury. The holding of the Supreme Court was that neither of these conditions was a prerequisite to recovery in a civil RICO action. Since the nature of the pattern to be shown was not then in issue, we agree with *Ianniello* that footnote 14 was dictum.

Nonetheless, the *Sedima* dictum was entitled to far greater deference than *Ianniello* gave it. Moreover, the language of the statute and the legislative history support the essential point of that dictum. There is no question that, technically, the language of the statutory definition of "pattern of racketeering activity" does not define but merely sets a minimum. That is, in contrast to certain other RICO definitions, which use the term "means," *see*,

e.g., § 1961(1), the definition of pattern "requires" at least two racketeering acts, implying, as *Sedima*'s footnote observed, that while two acts are necessary, they may not be sufficient.

The legislative history supports this inference, both explicitly and implicitly. Either proposed definitions of pattern were more susceptible to an interpretation that two racketeering acts, without more, would suffice. As revealed in the Senate Report on S. 30, which contained RICO as enacted, an earlier bill, S. 1861, would have defined the term as follows: "The term 'pattern of racketeering activity' *includes* at least *one* act occurring after the effective date of this chapter." S. Rep. No. 617, 91st Cong., 2d Sess. 122 (1969) ("S. Rep. 617") (emphasis added). The Department of Justice, responding to a request for comments on S. 1861, proposed a modification to clarify that "[t]he term 'pattern' indicate[d] that what [was] intended to be proscribed is not a single, isolated act of 'racketeering activity,' but at least two such acts." *Id.* The new proposed definition was: "The term 'pattern of racketeering activity' *means* at least two acts, one of which occurred after the effective date of this chapter." *Id.* (emphasis added). The Senate rejected the proposed modification, however, in favor of the version enacted in § 1961(5). *See id.* at 158. Thus, the evolution of the present definition ended with the substitution of "requires at least two" for "means at least two." This history amply supported the floor statement of Senator McClellan, sponsor of S. 30, that "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970).

The legislative history is thus inconsistent with a rule that any two acts of racketeering activity, without more, suffice to establish a RICO pattern. Accordingly, we abandon the *Ianniello* view that two acts, without more, suffice.

We note in passing that we do not believe *Weisman* stood for the proposition that two acts of racketeering activity sufficed without more to establish a pattern. While it might have stood for that proposition if only two acts of racketeering activity had been proven, in fact at least 10 (and perhaps as many as 18) racketeering acts had been proven, and *Weisman*'s statement that any two of the proven offenses sufficed to show a pattern must be interpreted against that background. It was plain that no two of these acts could be viewed as isolated or sporadic, for there were at least eight other similar acts.

Further, we no longer adhere to the view of *Ianniello* and its progeny that relationship and continuity are necessary characteristics of a RICO enterprise. Neither the statutory definition of enterprise nor the legislative history suggests that those concepts pertain to the notion of enterprise. Rather, the language and the history suggest that Congress sought to define that term as broadly as possible, "includ[ing]" within it every kind of legal entity and any "group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). To the extent that the legislative history discusses the concepts of relatedness and continuity, it does so in connection with proposed definitions of pattern of racketeering activity. *See.* S. Rep. 617, at 158 ("The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."); 116 Cong. Rec. 18940 (1970) (Statement of Sen. McClellan: "The term 'pattern' . . . requires the showing of a relationship . . . ."). We conclude that relatedness and continuity are essentially characteristics of activity rather than of enterprise.

An interrelationship between acts, suggesting the existence of a pattern, may be established in a number of

ways. These include proof of their temporal proximity, or common goals, or similarity of methods, or repetitions. The degree to which these factors establish a pattern may depend on the degree of proximity, or any similarities in goals or methodology, or the number of repetitions. Congress's elaboration on the concept of pattern in connection with its provision in 18 U.S.C. § 3575(e) for dangerous special offenders is instructive. As discussed in *Sedima*'s footnote 14, that section provided that criminal conduct would form a pattern if it embraced criminal acts that had, for example, "the same or similar purposes, results, participants, victims, or methods of commission." 18 U.S.C. § 3575(e) (1982), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 473, tit. II, §§ 212(a)(1) and (2), 235(a)(1), 98 Stat. 1987, 2031. Though the facts (a) that this section was part of the legislation that included RICO, and (b) that Congress did not include a similar elaboration as part of RICO, suggest that Congress did not intend the same definition to be engrafted onto RICO, these characteristics plainly are not irrelevant to proof of pattern. Though continuity and relatedness could be shown in other ways even if each of the listed similarities was lacking, we think the presence of any of these similarities could well justify a conclusion that the acts were related. *See generally* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009, 1030 & nn.97-101 (1980) ("Blakey & Gettings").

We recognize that to the extent relatedness is to be shown by the acts' temporal proximity, there may well be a tension between relatedness and continuity, for obviously the shorter the elapsed time between the two acts, the less it can be said that the activity is continuing. Nonetheless, "[i]t is important to recognize that in footnote 14 the Supreme Court does not enshrine 'continuity plus relationship' as a determinative two-pronged test. Rather, the Court quotes this language to demonstrate

how the pattern requirement should be interpreted to prevent the application of RICO to the perpetrators of 'isolated' or 'sporadic' criminal acts." *Sun Savings & Loan Ass'n v. Dierdorff*, 825 F.2d at 192. Further, we note that the legislative history referred not just to continuity but also to the *threat* of continuity. Therefore, where the virtual simultaneity of two acts suggests that they are related, the timing does not negate the existence of a pattern; rather, evidence of continuity or the threat of continuity will simply have to come from facts external to those two acts.

We do not agree with those courts that have in effect concluded that temporal proximity requires that two or more acts be counted as one. While temporal separation of events is a common feature of a pattern of action, it is not an essential; such a pattern may be found, for example, in the simultaneous commission of like acts for similar purposes against a number of victims.

Nor, with respect to the requirement of continuity or threat of continuity, do we see any basis in RICO or its legislative history for the proposition that a RICO violation cannot be established without proof of more than one scheme, episode, or transaction, or without proof that the scheme pursuant to which the racketeering acts were performed is a scheme with no apparent termination date. The statute defines racketeering activity in terms of criminal "acts," *see* §§ 1961(1)(A), (B), (C), and (E), or "offenses," *see* § 1961(1)(D); it similarly defines pattern in terms of "acts" of racketeering activity, *see* § 1961(5). There is no mention of schemes, episodes, or transactions. We doubt that Congress meant to exclude from the reach of RICO multiple acts of racketeering simply because they achieve their objective quickly or because they further but a single scheme. We note also that this view is consistent with our ruling in *United States v. Parness*, 503 F.2d 430. Indeed, though the *Ianniello* panel, in discussing enterprise, described the

record before it as showing "fraud continuing indefinitely" with "no obvious terminating goal or date," 808 F.2d at 191-92, we regard that reference as simply a description of some of the indicia of continuity in that case rather than a suggestion that proof of a scheme of indefinite duration would be required in every case.

In sum, though we would disapprove any attempt by the government or a private plaintiff to go beyond Congress's intent and fragment an act that plainly is unitary into multiple acts in order to invoke RICO, we conclude that where in fact there are a number of different acts, each should be separately counted. If there are similarities between them with respect to victim, methodology, goal, *etc.*, and if there is evidence of a threat of continuation of racketeering activity, we conclude that the acts may constitute a pattern even though they are nearly simultaneous.

In some cases both the relatedness and the continuity necessary to show a RICO pattern may be proven through the nature of the RICO enterprise. For example, two racketeering acts that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise. The nature of the enterprise may also serve to show the threat of continuing activity. Where the enterprise is an entity whose business is racketeering activity, an act performed in furtherance of that business automatically carries with it the threat of continued racketeering activity. Even where the enterprise is legitimate, if the racketeering acts were performed at the behest of an organized crime group, that fact would tend to belie any notion that the racketeering acts were sporadic or isolated. We do not suggest that a defendant's association with an organized crime group is itself an act of racketeering activity, or that the defendant is to be held accountable for the racketeering acts of others. We simply note that such an association may reveal the

threat of continued racketeering activity and thereby help to establish that the defendant's own acts constitute a pattern within the meaning of RICO.

Finally, we note that though the interrelatedness concept discussed above pertains to the predicate acts, it is plain that for establishment of a RICO violation there must also be some kind of relationship between the acts and the enterprise, for each of the substantive RICO subsections prohibits a specific type of interplay between a pattern of racketeering activity and the enterprise. Section 1962(a) prohibits use of income derived from a pattern of racketeering activity for the establishment of, or acquisition of an interest in, an enterprise engaged in or affecting interstate or foreign commerce. Section 1962(b) prohibits use of a pattern of racketeering activity to acquire an interest in, or control of, such an enterprise. And § 1962(c) prohibits use of a pattern of racketeering activity in the conduct of such an enterprise's affairs. Thus, no RICO violation can be shown unless there is proof of the specific relationship between the racketeering acts and the RICO enterprise. To the extent, therefore, that the relationship between acts necessary to establish a pattern depends on the relationships between individual acts and the enterprise, there will often be some overlap of proof and analysis. The degree of overlap will vary depending in part on the substantive RICO subsection at issue. The establishment of a subsection (a) violation, for example, will likely entail less overlap, since the acts by which the tainted income is acquired need have no logical relationship to the enterprise in which investment will thereafter be made. In contrast, establishment of a subsection (c) violation will often entail overlap, for each act of racketeering activity will be related to the enterprise since the latter's affairs are by hypothesis conducted through a pattern of such acts. The differences and overlap are simply a consequence of Congress's use of the same defined terms in fashioning different substantive prohibitions.

This is not to say that one should ever view the enterprise and the pattern as the same thing, for they are not. "[T]he concept 'enterprise' focuses on a group of people; . . . . The concept 'pattern' focuses on the relationship between acts of racketeering . . . ." Blakey & Gettings at 1026 n.91. But the difference in the nature of the two elements does not mean that the same piece of evidence may not help to establish both. *See Turkette*, 452 U.S. at 583 ("the proof used to establish these separate elements may in particular cases coalesce"); *Moss v. Morgan Stanley*, 719 F.2d at 22-23; *United States v. Mazzei*, 700 F.2d at 89-90. We conclude that evidence of the nature of the enterprise may be used to show the threat of continuity sufficient to establish a RICO pattern.

F. *Application of These Principles to Indelicato*

Under these standards, we have little difficulty in concluding that Indelicato's participation in the three Bonanno family murders as a representative of the Commission constituted a pattern of racketeering activity within the meaning of RICO. There were three persons targeted for assassination. Though the murders were virtually simultaneous, they plainly constituted more than one act. Further, the three murders were indisputably related since the purpose of each was facilitation of the desired change in leadership of the Bonanno crime family. Though the murders themselves were quickly completed, both the nature of the Commission, which was the alleged RICO enterprise, and the criminal nature of the Bonanno family, control of which the murders were designed to achieve, made it clear beyond peradventure that there was a threat of continuing racketeering activity. The evidence was plainly ample to permit the jury to infer that the murders were part of a RICO pattern.

CONCLUSION

We conclude that the nearly simultaneous murders of three persons as part of the conduct of the affairs of an organized crime enterprise constituted a "pattern of racketeering activity" within the meaning of § 1961(5). We remand the matter to the panel for further proceedings consistent with this ruling.

OAKES, *Circuit Judge* (concurring):

I concur in Judge Kearse's opinion and her analysis of RICO's "pattern" requirement. I write separately because it is important to emphasize that Indelicato's pattern" of racketeering activity did not consist solely of the three murders at Joe & Mary's Restaurant on July 12, 1979. Proof of these murders was necessary but not sufficient to prove a RICO pattern of racketeering activity. This is a case where evidence concerning the nature of the RICO enterprise also served to prove the existence of a pattern of racketeering activity. Facts external to the predicate acts—the three murders—were essential to prove relatedness and the threat of continuity.

This was the quintessential racketeering case. The indictment, the proof, and the trial judge's charge demonstrate that Indelicato was not an "independent contractor" called upon to commit an isolated crime. On the contrary, he was associated for some years with the ultimate criminal enterprise, the Commission of La Cosa Nostra. Indelicato committed murders which were critical to the enterprise's achieving its goal of resolving Family leadership disputes; these were not "isolated acts of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985).

The indictment further charged that one of the purposes of the Commission enterprise was to "extend[]

formal recognition to newly-elected Bosses of La Cosa Nostra Families, and [to] resolv[e] leadership disputes within a Family," as well as to "keep[] persons inside and outside La Cosa Nostra in fear of the Commission by identifying the Commission with threats, violence, and murder." Among the means used by the Commission to advance these general purposes was the resolution of "a leadership dispute within the Bonanno Family . . . by authorizing the murders of Carmine Galante, a/k/a 'Lilo,' who was Boss of the Bonanno Family, and Leonard Coppola and Giuseppe Turano." Thus, the indictment charged that there was an important connection between Indelicato's conduct and the overall common purposes of the racketeering enterprise. The murders were part of a larger plan, a reorganization or realignment of the Bonanno Family by the Commission.

The evidence was that in 1979 Indelicato was a formally inducted Soldier in the Bonanno Family, a Family that, because of its many factional disputes, was managed directly by the Commission. As a "made" member, Indelicato necessarily learned the Mafia rules set down by the Commission and took the oath to abide by those rules and to obey the Commission. Indelicato knew of and knew it had been engaging in, and that it would continue to engage in, racketeering activity.

Indelicato was chosen to carry out a murder plan so important that the Commission itself had the exclusive power to authorize it—namely, the assassination of the Boss of a La Casa Nostra Family. Indelicato's conspiracy with the Commission to murder the three involved planning which continued over a significant time period, beginning in June 1979, when the getaway car eventually used in the killing was stolen. There was evidence that a few days before July 12, Louis Giongetti—an associate of Indelicato—was instructed to collect a cache of shotguns and handguns and place them in the trunk

of a car, and to return with them to a bar where Indelicato and another Mafioso were wating. Indelicato was promoted to captain in the Bonanno Family as a reward for the killings.

The district judge correctly instructed the jury on the elements of the RICO substantive offense. He used language specifically approved as embodying the "observations in footnote 14" of *Sedima, United States v. Teitler*, 802 F.2d 606, 612 (2d Cir. 1986), when he described the "pattern" requirement for the jury:

> Whether you are considering a pattern of loansharking, extortion, labor law violations or acts of murder, . . . when you are considering whether they form a pattern, as to any defendant, you must find that the defendant's acts are not isolated or disconnected. You must find that they are related or connected by some common scheme, plan, or motive. Thus you must find that the acts constituted *part of a larger pattern of activity* that characterized the defendant's participation in the affairs of the enterprise and you must consider and find whether or not there is a continuity plus relationship in the acts as to the defendant you are considering.

(Emphasis added.)

Thus, the jury was instructed that it could convict Indelicato only if it found his acts to be integrally related to the larger pattern of the enterprise's activities, and not merely isolated or sporadic. The criminal nature of the enterprise involved in this case provides the continuity or threat of continuity necessary to establish a pattern. I believe that this is implicit in the majority opinion; accordingly, I concur.

MAHONEY, *Circuit Judge* (concurring):

I am in general agreement with Judge Kearse's excellent opinion, and write separately only to state my disagreement with its assertion that "the concepts of relatedness and continuity are attributes of activity, not of a RICO enterprise . . . ;" a point reiterated in several variations in the majority opinion.

The Supreme Court stated in *United States v. Turkette*, 452 U.S. 576 (1981), that:

> The [enterprise] is provided by evidence of an *ongoing organization*, formal or informal, and by evidence that the associates *function as a continuing unit.*

Id. at 583 (emphasis added). It would thus appear clear that continuity is an attribute of a RICO enterprise, as well as a RICO pattern. As to relatedness, there will presumably be a relationship (1) between the associates that function as a continuing unit, and (2) between the associates and the unit.

The majority's essential point is that the discussion of relatedness and continuity in *Sedima* footnote 14 refers to the RICO pattern rather than the RICO enterprise. I agree and think that is what we should say.